

Date Issued: June 12, 1985 (AGO 85-23)

Requested by: James E. Sperry, Superintendent, North Dakota  
Historical Society

- QUESTION PRESENTED -

Whether the information contained in the North Dakota Workmen's Compensation Bureau Minute Record, including employer's names and amounts of premium adjustments, is open to public inspection pursuant to North Dakota's Open Records Law.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that information contained in the North Dakota Workmen's Compensation Bureau Minute Record, including employer's names and amounts of premium adjustments, is open to public inspection pursuant to North Dakota's Open Records Law.

- ANALYSIS -

N.D.C.C. section 44-04-18, provides as follows:

44-04-18. ACCESS TO PUBLIC RECORDS - PENALTY.

1. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.
2. Violations of this section shall be punishable as an infraction.

In determining whether the information contained in the minute record, including employer's names and premium adjustments, is confidential, a two-pronged inquiry is used. First, are the records in the possession of an agency subject to the Open Records Law? Applicability of the Open Records Law can be broken down into three categories:

- A. Public or governmental bodies, boards, bureaus, commissions, or agencies of the State of North Dakota.
- B. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state.
- C. Organizations or agencies supported in whole or in part by public funds, or which expend public funds.

If an agency in question can satisfy any one of the three categories listed above, it is subject to the North Dakota Open Records Law. Since the North Dakota Workmen's Compensation Bureau (hereinafter referred to as "Bureau") is a public or governmental bureau, the

requirement is satisfied.

The second inquiry is whether the records in question are of the type subject to the Open Records Law. There is no statutory definition of the term "record." However, the North Dakota Supreme Court, in *City of Grand Forks v. Grand Forks Herald* 307 N.W.2d. 572 (N.D. 1981), has indicated that the term "record", as well as the entire Open Records Law, should be given an expansive meaning. Further, the court concluded that the term was not unambiguous and includes records which are in the possession of the public body in question. Indeed, the court specifically rejected the proposition that thought processes, work product, preliminary data, and worksheets and notes are not records. The court also concluded that records which are in the possession of the agency but which are not required to be kept by law are nonetheless subject to the Open Records Law.

Therefore, any record in the possession of the public agency in question, in this case the Bureau, is subject to the Open Records Law unless there is a specific statutory exemption for that record. In other words, once records are found to be within the hands of an agency which is subject to the Open Records Law, such as those containing employer's names and premium adjustments, they are presumptively disclosable to the public during normal business hours. However, the records may still be withheld by the agency in question if they fall within an exception to the disclosure provisions of the Open Records Law.

The authority for exemptions from public disclosure under the Open Records Law is covered by the introductory phrase of the Open Records Law which states as follows:

Except as otherwise specifically provided by law . . .

This phrase indicates that there may be specific legal provisions for the nondisclosure of certain records in the possession of public or governmental bodies. The phrase "by law" would refer to both state as well as federal laws. However, the term "specifically" indicates the need for a specific exemption as opposed to an implied or arguable exemption.

This requirement for specific exemptions is in line with the statutory interpretation which construes narrowly exceptions to the Open Records Law and construes liberally in favor of the coverage of such laws concluding that access to information concerning the conduct of the peoples' business is a fundamental and necessary right of every person in this state. *Grand Forks Herald supra*.

In reviewing the various statutes of the Workmen's Compensation Bureau, the only plausible specific exemption to the Open Records Law is N.D.C.C. section 65-04-15 which provides, in part, as follows:

65-04-15. INFORMATION IN EMPLOYER'S RECORDS CONFIDENTIAL - PENALTY IF EMPLOYEE OF BUREAU DIVULGES INFORMATION. The information contained in an employer's records shall be for the exclusive use and information of the bureau in the discharge of its official duties and shall not be open to the public nor used in any court in any action or proceeding pending therein

unless the bureau is a party thereto. The information contained in such report, however, may be tabulated and published by the bureau in statistical form for the use and information of the state departments and of the public.

. . .

The quoted statute applies only to information contained in an employer's report or, as it is better known, an employer's payroll report. However, the statute does exempt certain statistical aspects of the employer's reports from its grant of confidentiality. Thus, information in an employer's record which has been published by the Bureau in statistical form is available for public inspection.

Employer reports contain information relative to actual and estimated annual payroll expenditures. N.D.C.C. section 65-04-05. The reports do not contain premium adjustment information. Although the employer reports do include the employer's name, that same information is available in statistical form. Thus, such information is not specifically exempted from the Open Records Law by N.D.C.C. section 65-04-15.

It is my opinion that there is no specific exemption with respect to the Bureau's minute record and that the North Dakota Open Records Law applies. Therefore, the Minute Record, including the premium adjustments and employer names, remains open and accessible for inspection during reasonable office hours. Furthermore, it is my opinion that confidential information, when made a part of an otherwise public record, remains confidential. In other words, if a record contains both public and confidential information, the public part remains open to inspection, but the confidential portion remains closed.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. section 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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Attorney General

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